Supreme Court, U.S.
FILED

(1)

98 411 AUG 18 1998

No. _____

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

RICHARD HUBER,

Petitioner

v.

D.C. COURT OF APPEALS,

D.C. BOARD ON PROFESSIONAL RESPONSIBILITY, and

D.C. OFFICE OF BAR COUNSEL,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia

---

PETITION FOR A WRIT OF CERTIORARI

Richard Huber, Esq., pro se
2025 I Street, N.W.
Suite 513
Washington, D.C. 20006
(202) 861-5885

34 pp

QUESTIONS PRESENTED

In this disciplinary proceeding Petitioner was suspended from the practice of law in March 8, 1995, and Ordered disbarred on March 19, 1998. The following questions are presented in this Petition:

(1) Whether Appellees' refusal to allow Petitioner to withdraw his consent to disbarment and consider his previously briefed arguments for remand to consider evidence in mitigation of the Board on Professional Responsibilities' Recommendation of disbarment deprived Petitioner of his constitutionally protected right to due process under the Fourteenth Amendment.

(2) Whether the D.C. Court of Appeals March 8, 1995, Order of interim suspension from the practice of law, and D.C. App. Rule XI, Sec. (3) (c) and D.C. App. Rule XI, Sec. 14 (e), as amended January 1, 1995, are unconstitutional on their face as applied in that they deprived Petitioner of his constitutionally protected right to due process under the Fourteenth Amendment.

PARTIES AND RULE 29.6 STATEMENT

All of the parties who participated below are set out in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES AND RULE 29.6 STATEMENT. . .ii

TABLE OF CONTENTS iii

INDEX TO APPENDICES iv

TABLE OF AUTHORITIES v

OPINIONS BELOW. 1

JURISDICTION. 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION. . 9

CONCLUSION 17

INDEX TO APPENDICES

A	March 19, 1998, Order
B	Doyle Affidavit
C	Polin Affidavit
D	Huber Affidavit

TABLE OF AUTHORITIES

Cases — Page

Barry v. Barchi,
443 U.S. 55 (1979) 12, 15

Ciechon v. City of Chicago,
634 F2d 1055
(7th Cir 1980. 15

Eugia v. Thompkins,
757 F2d 1130
(5th Cir. 1985). 15

Finberg v. Sullivan,
634 F2d 50
(3d Cir. 1980) 15

Fusari v. Steinberg,
419 U.S. 379 (1975); 15

Gershenfeld v. Supreme Court of Pennsylvania,
641 F. Supp. 1419
(E.D. Pa. 1986) 12

Hopkins v. Mayor & Council of City of Wilmington,
600 F. Supp. 542
(D. Del. 1984) 15

In re Hines,
482 A2d 378 (D.C. 1984). 11

In re James,
452 A2d 163 (D.C. 1982). 11

In re Kersey,
520 A2d 321 (DC 1987) . . .3, 9, 10

In re Malvin,

466 A2d 1220 (D.C. 1983) 6

In re Peek,
565 A2d 627 (DC 1989). 3

In re Rosen,
470 A2d 292 (D.C. 1983). 11

In Re Thompson,
579 A2d 218 (DC 1990). . . . 10, 11

In re Washington,
513 A2d 245 (D.C. 1983). 12

In re Williams,
464 A2d 115 (D.C. 1983). 12

Mackey v. Moutrym,
443 U.S. 1 (1979). 12, 15

Ram v. Heckler,
792 F2d 444
(4th Cir. 1986). 15

Ritter v. Cohen,
797 F2d 119
(3d Cir. 1986) 15

RULES

D.C. Board Rule 11.10 10

D.C. Board Rule 11.11 10

D.C. Bar Rule XI,
section 3(c). 5, 12, 13, 14

D.C. Bar Rule XI,
section 14(e) 6, 12, 13, 15

CONSTITUTIONAL PROVISIONS

Article IV, § 2 [1] 1

Seventh Amendment 1

Fourteenth Amendment. 2

PETITION FOR A WRIT OF CERTIORARI

Richard Huber respectfully petitions for a Writ of Certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is attached as Appendix A.

JURISDICTION

The District of Columbia Court of Appeals rendered its decision on March 19, 1998, (although it did not formally deny Petitioner's Motion, in part, until April 2, 1998.) Petitioner filed on April 2, 1998, a timely Petition For Rehearing Or Rehearing En Banc which was denied on May 20, 1998. This court's jurisdiction is invoked under 28 USC § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, § 2 [1] of the U.S. Constitution states:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. The Proceedings Below.

In July 1992, the D.C. Bar Counsel's office began an investigation of Petitioner's financial practices based on a report from the D.C. Superior Court that Petitioner, on April 23, 1992, had written a check to the D.C. Superior Court for $20 which was returned for insufficient funds. This investigation led to disciplinary proceedings which alleged that Petitioner had engaged in various financial improprieties during the period from June 1990 through March 1992.

The process by which allegations of attorney misconduct are adjudicated in D.C. is as follows:

(1) D.C. Bar Counsel investigates and, if it determines that there has been misconduct serious enough to suggest disciplinary proceedings it makes a request to a committee of the D.C. Board on Professional Responsibility (Board) for permission to begin a proceeding. If that permission is granted, charges are filed and

the attorney is notified by a charging document.

(2) The matter is referred to a Board Hearing Committee (Committee) composed of two lawyers and a lay person, which holds an evidentiary hearing on the charges and then issues a Report and Recommendation to the Board. This is the only point in the process at which there is any factual or evidentiary hearing.

(3) Either the respondent attorney or Bar Counsel may file exceptions to the Committee report and argument on any exceptions is heard before the Board.

(4) The Board then makes its Report and Recommendation to the D.C. Court of Appeals (Court). Again, either Bar Counsel or the respondent attorney may file exceptions to the Board's Report and argument on any exception is heard by the Court which alone has the authority to discipline an attorney.

This case involved, among other things, allegations that client funds were misappropriated. In D.C., an attorney who has misappropriated client funds is almost always disbarred unless he can show that his misconduct was caused by an addiction to drugs or alcohol or mental disability. See In re Kersey, 520 A2d 321 (DC 1987); and In re Peek, 565 A2d 627 (DC 1989). If an

attorney makes such a showing in mitigation, and, further, can show that his addiction or disability has been brought under control, he can avoid disbarment. Under D.C. Board of Professional Responsibility Rules 11.10 and 11.11, then in effect, a respondent is precluded from adducing such evidence in mitigation unless the issue is raised before the Committee unless a respondent petitions the Board at least five days prior to the Board Argument on exceptions and show good cause why the matter was not raised before the Committee. Although the above Rules specifically allow for a respondent to offer evidence in mitigation as long as the issue is raised before the Board review of the Committee Report, no procedure is set out for the conduct of an evidentiary hearing. Pattern and practice allow for the Board to remand the matter to the Committee to hear such evidence.

In this case, in October 1994, after the Report and Recommendation of two Committees and before the Board hearing on exceptions was scheduled, Petitioner was diagnosed as suffering and having suffered during the period of alleged misconduct, with severe mental depression which was brought under control with medication.

On December 1, 1994, Petitioner, by motion, asked the Board to remand his case to allow him to present evidence in mitigation based on his mental disability during the period of his misconduct caused by severe depression, which

Petitioner's psychiatrist averred was the cause of the misconduct. See Appendix B.

In what Petitioner's counsel characterized as retribution against Petitioner for raising the issue of mitigation, the Board scheduled a hearing on the Committee Reports and Recommendation for January 12, 1995, and refused Petitioner's request to postpone that hearing to allow him to present evidence of mental disability. See Appendix C.

The Board issued its Report and Recommendations to the Court on February 13, 1995 in which the Board denied Petitioner's December 1, 1994 Motion for Remand to a Committee for hearing on evidence of mental disability in mitigation. In its denial of Petitioner's request for a remand, the Board stated that Petitioner's proffer of his mitigation evidence did not show good cause to explain why he did not come forward with mitigation evidence before the Committee, even though Petitioner had made such a proffer, supported by an affidavit from his treating psychiatrist that Petitioner had been, as many mentally depressed people are, unaware of the nature and extent of his impairment until his diagnosis. This is a common effect of the disease.

Further, prior to its February 13, 1995 Report, the Board, on January 18, 1995, petitioned the court for an interim suspension of Petitioner pursuant to Rule XI, section 3(c) of the D.C. Bar, which Rule had been amended January 1, 1995 to

allow an attorney who was accused of misappropriation to be suspended from the practice of law without a showing of recent acts or omissions that posed threat of harm to the public, contrary to the the rule set out in In re Malvin, 466 A2d 1220 (D.C. 1983).

On February 16, 1995, Bar Counsel filed a separate Motion with the Court requesting a temporary suspension of Petitioner's law license pursuant to D.C. App. Rule XI, Sec. 14(e), also as amended January 1, 1995.

This Petition of the Board and Motion of Bar Counsel were the first use of the new rules which made interim and temporary suspensions of attorneys in Bar proceedings procedurally less difficult to obtain by doing away with provisions of the old rules that required a showing of current acts or omissions by an attorney that made him a current threat to the public. It was the contention of Petitioner's then counsel that these new rules were used against Petitioner solely in retaliation for Petitioner's attempt to offer mitigation evidence. See Appendix C.

Petitioner opposed the Board's Petition for interim suspension and Bar Counsel's Motion for temporary suspension and requested an evidentiary hearing on the issues raised by the Board's Petition and Bar Counsel's motion. No such hearing was allowed (none is provided for by either Rule) and Petitioner was suspended from the practice of law by Order of the D.C. Court of Appeals on

March 8, 1995, based on allegations in the above Petition of the Board and Motion of Bar Counsel of the same misconduct which was then the subject of Bar proceedings and which had all occurred between 1990 and 1992. There were no allegations of current misconduct. Petitioner also asked for but was denied any post suspension hearing on either the issues raised in the Board's Petition for suspension, Bar Counsel's motion for temporary suspension or issues raised in his request for a hearing on the mental disability issue in mitigation.

Petitioner and Bar Counsel noted and briefed exceptions to the Report and Recommendations of the Board. Bar Counsel's brief urged the Court to accept the Board's Report and Recommendations which included disbarment of Petitioner. Petitioner's Brief, among other issues raised, asked the Court to remand the matter to the Board for assignment to a Committee for an evidentiary hearing on the issue of mental disability in mitigation. The Court did remand to the Board for the Board's reconsideration of Petitioner's request for such a hearing. The Board again denied Petitioner any evidentiary hearing on mitigation issues and did not allow submission of, or consider any such evidence.

In February, 1997, Petitioner pled guilty to two counts of contempt for violating the above suspension Order. However, no disciplinary proceeding was begun based on the contempt charge.

In March 1997, Petitioner, having been deprived of his license to practice for over two years without any hope of obtaining a hearing on his mitigation issues, filed a Motion with the Board requesting he be allowed to voluntarily submit to disbarment. With his motion Petitioner filed an Affidavit Declaring Consent To Disbarment in which he stated, in part:

> "I am submitting this consent to disbarment because I am convinced that I could not successfully defend the findings of the report of the Board . . . ". See Appendix D.

Based on Petitioner's Motion Bar Counsel asked the Court to hold the previously filed and briefed exceptions of Petitioner in abeyance until the Board ruled on Petitioner's request to be allowed to consent to disbarment.

The Board then issued another Report and Recommendation that urged the court to accept Petitioner's Consent to Disbarment on the condition that Petitioner pay certain restitution to clients over and above that which Petitioner had already agreed to do. Petitioner timely filed exceptions to the new Board Report and Recommendations, and, further, at oral argument, on his exceptions, Petitioner withdrew his consent to disbarment and asked the Court to rule on all exceptions filed. By its Order of March 19, 1998, the Court refused to allow Petitioner to withdraw his consent to disbarment, refused to consider his previously filed and briefed

exceptions to the Board's recommendation of disbarment, and ordered him disbarred on consent.

On May 20, 1998, the Court denied Petitioner's Petition For Rehearing or Rehearing En Banc.

REASONS FOR GRANTING THE PETITION

I. APPELLEES' REFUSAL TO ALLOW PETITIONER TO WITHDRAW HIS CONSENT TO DISBARMENT AND CONSIDER HIS PREVIOUSLY BRIEFED ARGUMENTS FOR REMAND TO CONSIDER EVIDENCE IN MITIGATION OF THE BOARD'S RECOMMENDATION OF DISBARMENT DEPRIVED PETITIONER OF HIS CONSTITUTIONALLY PROTECTED RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The Court's March 19, 1998, Order incorrectly equates Petitioner's withdrawal of his request for disbarment with repudiation of statements under oath (presumably his affidavit declaring consent to disbarment). See Appendix A, p. 341. There is nothing in the affidavit that need be repudiated in order to allow Petitioner to withdraw his Motion of Respondent to Accept Consent to Disbarment. See Appendix D.

Petitioner can logically and did request permission to withdraw his Motion of Respondent To Consent To Disbarment before it was acted upon by the Court, which has sole authority to grant or deny such a motion, without repudiating any averment in his affidavit purporting to admit to ethical violations. Under Kersey, supra, to be eligible for mitigation a respondent must admit his ethical violation. Thus it is illogical

for the Court, the Board or Bar Counsel to suggest that Petitioner is in any way repudiating his affidavit as it related to his admission of ethical violations since the sole reason for Petitioner to withdraw his Motion To Consent To Disbarment is to be allowed a remand to have his evidence in mitigation heard. Petitioner did not come before the Court for the first time at his Oral Argument to request such a remand (even though there is case law that suggests that Petitioner would be entitled to a remand even if he had. See In Re Thompson, 579 A2d 218 (DC 1990). Rather, this request for a remand was presented by Motion to the Board in December, 1994, again at the Board argument in January, 1995, in Motion before the Court and in Petitioner's July 1996 Brief on his Exception To The Report And Recommendation Of The Board On Professional Responsibility.

The Board's Rule 11.10 and 11.11 require a respondent to raise (Kersey type) evidence in mitigation at the Committee Hearing unless good cause is shown why such evidence was not raised. The above rules also state that a Respondent has waived his right to submit evidence in mitigation unless he files a Motion for remand with the Board at least five days prior to oral argument requesting a waiver of the rule in order to present such evidence.

Petitioner filed his waiver request six weeks prior to the oral argument before the Board. That request stated his good cause for his failure to raise it before Committee to be, in part, that, because of the nature of the illness

itself, he was unaware of his mental disability until some time after the Committee hearing. Petitioner raised the issue as soon as he became aware that there was such an issue. It has long been recognized in D.C. that a respondent in a disciplinary proceeding must raise an issue before a hearing committee or the Board in order to preserve review by the Court of Appeals. See In re James, 452 A2d 163 (D.C. 1982); In re Rosen, 470 A2d 292 (D.C. 1983); In re Hines, 482 A2d 378 (D.C. 1984); and In re Thompson, Supra.

At each step of the process both before and after Petitioner's March 8, 1995, suspension, Petitioner made a timely application for a hearing on the issue of evidence in mitigation. First the Board, and then the Court steadfastly refused to allow such a hearing until, seeing no hope of ever obtaining such a hearing Petitioner Moved for Voluntary Disbarment. Before that motion was acted upon by the Court, Petitioner sought, in one final desperate attempt to obtain due process via a hearing on the issue of mitigation, to withdraw that Motion, asking the Court to consider finally his never considered but fully briefed argument as to why he should receive a remand for such a hearing. The court finally again denied Petitioner's request asking rhetorically why he should be allowed to withdraw his request for voluntary disbarment. The more pertinent question ought to be why should he not be allowed to withdraw his Motion. There would be no loss of the Court's time, the matter was already fully briefed and had been held in abeyance. There was clearly no possible threat to the public,

Petitioner was already suspended. In short, there was and remains no public interest to contravene Petitioner's strong property interest in his license to practice law.

A long line of cases hold that Petitioner be allowed a full and fair hearing at which he be allowed to submit all relevant evidence before being deprived of a property right. See Barry v. Barchi, 443 U.S. 55 (1979); Mackey v. Moutrym, 443 U.S. 1 (1979); Gershenfeld v. Supreme Court of Pennsylvania, 641 F. Supp. 1419 (E.D. Pa. 1986). See also In re Williams, 464 A2d 115 (D.C. 1983) (remedy for due process violations is to reject report of Board and remand for new hearings); and In re Washington, 513 A2d 245 (D.C. 1983) (deprivation of full rights in disciplinary hearing results in remand for new hearing). Petitioner has repeatedly asked for and been denied the right to present evidence to show that at the time of the ethical misconduct he was suffering from an undiagnosed illness that was the primary cause of the misconduct, and which illness has since been brought under control.

II. THE D.C. COURT OF APPEALS MARCH 8, 1995, ORDER OF INTERIM SUSPENSION FROM THE PRACTICE OF LAW, AND D.C. APP. RULE XI, SEC. (3) (c) AND D.C. APP. RULE XI, SEC. 14(e), AS AMENDED JANUARY 1, 1995, ARE UNCONSTITUTIONAL ON THEIR FACE AS APPLIED IN THAT THEY DEPRIVED PETITIONER OF HIS CONSTITUTIONALLY PROTECTED RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

It was the March 8, 1995 Order that led irrevocably to Petitioner's

disbarment Order. That Order, pursuant to the Board's Petition under Rule XI, Sec. 3 (c) and Bar Counsel's Motion under Rule XI, Sec. 14 (e) was silent as to which Rule it was applying or whether it was granting the Board's Petition, Bar Counsel's Motion or both. Whatever its basis it was over Petitioner's strong objection after denial of Petitioner's request for a hearing on matters raised in either the Board's Petition or Bar Counsel's Motion, and supplemented by denial of Petitioner's request for reconsideration of the Order. Not only was Petitioner denied a hearing but neither Rule provides for either a pre or post order hearing.

The Board and Bar Counsel argued that the Committee Hearings afforded Petitioner "all the process he was due", notwithstanding the fact that the Committee Hearings took place over a year before either Rule went into effect and neither temporary nor interim suspension was at issue at any hearing. Petitioner was suspended pursuant to rules that did not exist at the time of his Committee hearings for allegedly posing an imminent threat to the public based on allegations of ethical violations not yet fully adjudicated, all of which had taken place three to five years earlier.

Further, the Board's Petition preceded its own Report and Recommendation; calling into question the integrity of the Board's consideration of the matter.

D.C. App. Rule XI, Sec. 3 (c) as amended January 1, 1995, provides:

"Temporary suspension or probation: On petition of the Board authorized by its Chairperson or Vice Chairperson, supported by an affidavit showing that an attorney appears to pose a substantial threat of serious harm to the public by misappropriating funds, or by other action, the Court may issue an order, with such notice as the Court may prescribe, temporarily suspending the attorney or imposing temporary conditions of probation on the attorney, or both. Any order of temporary suspension or probation which restricts the attorney's maintenance or use of a trust account shall, when served on any bank maintaining an account against which the attorney may make withdrawals, serve as an injunction barring the bank from making further payment from the account on any obligation except in accordance with the restrictions imposed by the Court. An order of temporary suspension issued under this subsection shall preclude the attorney from accepting any new cases or other legal matter, but shall not preclude the attorney from continuing to represent existing clients during the thirty-day period after the issuance of the order; however, any fees tendered to the attorney during that thirty-day period or at any time thereafter while the temporary suspension is in effect shall be deposited in a trust

> account, from which withdrawals may be made only as directed by the Court."

D.C. App. Rule XI, Sec. 14 (e) as amended January 1, 1995, provides:

> "Imposition of discipline pendente lite. The Court, sua sponte or on motion, may order that the discipline recommended by the Board shall take effect pending the Court's determination of the merits of the case."

Neither rule provides for any prompt dispositional pre or post deprivation hearing. A failure to so provide has repeatedly been held to be a critical factor in determining the constitutional validity of an interim or temporary suspension process. (Although it is clear from the manner in which these rules were applied vis a vis Petitioner that there was never any intent that the suspension be anything but permanent). See Barry v. Barachi, Supra; Mackey v. Moutrym, Supra; Fusari v. Steinberg, 419 U.S. 379 (1975); and Ritter v. Cohen, 797 F2d 119 (3d Cir. 1986). See also Eugia v. Thompkins, 757 F2d 1130 (5th Cir. 1985); Ram v. Heckler, 792 F2d 444 (4th Cir. 1986); Ciechon v. City of Chicago, 634 F2d 1055 (7th Cir 1980; Finberg v. Sullivan, 634 F2d 50 (3d Cir. 1980); and Hopkins v. Mayor & Council of City of Wilmington, 600 F. Supp. 542 (D. Del. 1984).

All of these cases speak to the issue of how rapidly a post suspension hearing need be afforded before the delay is too long to pass constitutional muster. In

the instant case, there is no issue of "delay". No hearing is provided for in either Rule and none was ever allowed or intended to be allowed.

Petitioner lost his livelihood prior to the adjudication of allegations of misconduct based on a "temporary" or "interim" suspension that was clearly both retaliatory to him for having the temerity to move for a remand to have evidence of mitigation considered and, further, not ever really intended by the moving parties or the Court to be anything but permanent.

Further, this was done by a process that precluded any evidentiary hearing, ever.

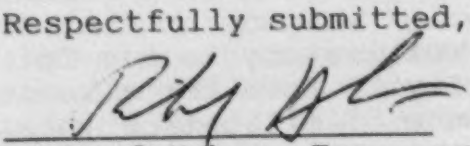
It is not sufficient to no say that Petitioner waived his right to object to this process when he finally moved to be allowed the dubious benefit of having his disbarment be by consent when that motion was not filed until two years after his suspension. More pertinently, when Petitioner sought to withdraw his consent to disbarment before the motion was acted upon by the Court, his request was denied.

This is not the treatment that ought to be afforded to a member heretofore in good standing with this U.S. Supreme Court since 1982.

CONCLUSION

For the above reasons a Writ of Certiori should be granted to review the judgment and opinion of the D.C. Court of Appeals.

Respectfully submitted,



Richard Huber, Esq., pro se
2025 I Street, N.W.
Suite 513
Washington, D.C. 20006
(202) 861-5885

APPENDICES

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

District of Columbia Court of Appeals

No. 95-BG-35

IN RE RICHARD L. HUBER,

RESPONDENT.

A Member of the Bar of the
District of Columbia Court of Appeals

On Report and Recommendation of the
Board on Professional Responsibility

(Argued January 23, 1998 Decided March 19, 1998)

Richard L. Huber, respondent, *pro se*.

Julia L. Porter, Assistant Bar Counsel, with whom *Leonard H. Becker*, Bar Counsel, and *Michael S. Frisch*, Senior Assistant Bar Counsel, were on the brief, for the Office of Bar Counsel.

Before STEADMAN, SCHWELB and RUIZ, *Associate Judges*.

STEADMAN, *Associate Judge*: Already temporarily suspended from the practice of law by this court's order of March 8, 1995, respondent Richard L. Huber on March 3, 1997, filed an affidavit consenting to the entry of an order of disbarment. The only issues before us relate to the recommendations of the Board on Professional Responsibility that the order of disbarment 1) provide for the payment of interest on restitution payments made or to be made, and 2) be effective only as of the time that respondent shall have filed an affidavit pursuant to D.C. Bar Rule XI, § 14(g). We adopt the recommendations of the Board and order respondent disbarred accordingly.

I.

In 1994, two hearing committees determined that Huber had engaged in numerous ethical violations, including misappropriation. In a Report and Recommendation of February 13, 1995 ("the February 1995 Report"), the Board recommended that we disbar Huber and require him to make restitution with interest to four clients.

On March 8, 1995, pursuant to a petition by the Board, this court temporarily suspended Huber from the practice of law in the District of Columbia pending our review of the February 1995 Report. *See* D.C. Bar R. XI, §§ 3(c), 14(e) (1997). On March 22, 1995, Huber filed a sworn affidavit with this court purporting to comply with our suspension order and the terms of Bar Rule XI, § 14(g). However, as it turned out, he did not comply with the suspension order. In February of 1997, Huber pled guilty to two counts of criminal contempt of this court's order placing him on interim suspension, *viz.*, the unlawful practice of law in connection with a Virginia matter and the failure to place client fees in a trust account.

Meanwhile, Huber and Bar Counsel submitted briefs for our review of the February 1995 Report, and we scheduled oral argument for March 4, 1997. One day before oral argument, Huber filed an affidavit consenting to disbarment under the terms of the February 1995 Report. We granted Huber's motion to stay oral argument so that the Board could consider his affidavit consenting to disbarment and prepare a new report pursuant to Bar Rule XI, § 12(b). That Report is now before us, together with Huber's two exceptions thereto.[1]

---

[1] In his reply brief to us, Huber suggests that the prospect of paying interest was so contrary to his understanding of the terms of his disbarment that he now "withdraws his request" for disbarment. However, he presents no cogent reason why he should be permitted to withdraw his consent and repudiate his statements under oath at

(Footnote continued on next page.)

II.

The first question before us that Respondent Huber has identified is "[w]hether the Board erred in recommending that respondent pay interest to Isabella Johnson, John Cone and/or Charles Osterhoudt, Leroy Allen, and Miriam Kopanic." Huber argues that interest is an inappropriate component of restitution because his clients have already received their principal amounts. All four clients, he represents, have been compensated by the Clients' Security Trust Fund of the District of Columbia Bar ("CSTF") and therefore have forfeited their rights to interest.[2]

---

1 (Continued)

this late date. As demonstrated in the text discussing the interest requirement, the affidavit expressly accepts the order of the Board, which included restitution "with interest." In any event, the issues of interest and effective date of the disbarment are not additional unexpected conditions but simply aspects of the consent to disbarment that must necessarily be dealt with in effectuating it. If the payment *vel non* of interest and the effective date were so material as to warrant withdrawal of the consent, it is inexplicable that respondent would not have dealt with them in the consent itself. All the foregoing is quite apart from the established and controlling principle of appellate review that a party may not raise new arguments in its reply brief. *See, e.g., Bingham v. Goldberg, Marchesano, Kohlman, Inc.*, 637 A.2d 81, 95 n.34 (D.C. 1994). Here, Bar Counsel has not had an opportunity to respond to Huber's argument that the interest provision vitiated his consent to disbarment.

2 With the exception of Isabella Johnson, we do not understand Huber to challenge the relevant principal amounts or the effective dates as set forth in the April 1997 Report (incorporating by reference Bar Counsel's response). As indicated in the text, Huber asserts that he has already made restitution in significant part, a fact which, if confirmed, will set the termination dates for the calculation of the relevant interest.

(Footnote continued on next page.)

To begin, we note that Huber agreed to pay interest to these four clients by the terms of his own consent to disbarment. The February 1995 Report specifically provided for restitution on behalf of the named clients "with interest." In his Affidavit Declaring Consent to Disbarment, Huber stated that he "accepted the order of the Board relating to restitution" and represented that he had "begun making restitution to the D.C. Bar Client Security [Trust] Fund in compliance with that recommendation." Thus Huber's own consent to disbarment incorporates by reference the Board's recommendation that he pay restitution "with interest."

The obligation to pay interest is intertwined with the obligation to make restitution. Even if Huber has repaid the principal -- a fact not proven below and unverifiable on the record before us — that would not absolve him of the duty to pay interest for the period between the misappropriation and the repayment, if any. Interest in this context is not a consequential damage of the attorney's misconduct, *compare In re Robertson*, 612 A.2d 1236, 1239-41 (D.C. 1992), but an obligation arising from the client's deprivation of the use of his or her money. *See generally Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1253 (D.C. 1990) (explaining that courts impose interest to compensate creditors for delays in repay-

---

2 (Continued)

As to Isabella Johnson, Huber disputes the amount of his principal financial obligation as determined by the Board. However, as indicated in the text, by consenting to disbarment, Huber accepted the order of the Board relating to restitution. In his own words, "I acknowledge that the material facts in the Board's report upon which the allegations of misconduct are predicated are true." These "material facts" included a determination that Huber owed Johnson $1,751, the same amount indicated in the April 1997 Report. In light of Huber's affidavit acknowledging the truthfulness of the Board report, which was his only pleading before the Board germane to this issue, we do not review the particulars of his debt to Johnson. *Cf. In re James*, 452 A.2d 163, 168-70 (D.C. 1982).

ment). For this reason, we direct the respondents in disciplinary matters to make restitution not only of the principal but also of interest at the legal rate of six percent. *See, e.g., In re Foster*, 699 A.2d 1110, 1110 (D.C. 1997) (per curiam); *In re Clarke*, 684 A.2d 1276, 1281 (D.C. 1996) (per curiam); *In re Dietz*, 633 A.2d 850, 851 & n.2 (D.C. 1993) (per curiam); *see also* D.C. Code § 28-3302(a) (1996) (setting the interest rate "in the absence of expressed contract" at six percent per annum).

We are wholly unpersuaded by Huber's argument that his clients have assigned their claims against him to the CSTF and thus forfeited their right to interest, or that only CSTF may assert a right to interest. The CSTF is not an independent collection agency but a creature of this court, created pursuant to Bar Rule XII. This court may "require an attorney to make restitution either to persons financially injured by the attorney's conduct *or to the Clients' Security Trust Fund* (see Rule XII), *or both*, as a condition of probation or of reinstatement." D.C. Bar R. XI, § 3(b) (emphasis added).

Under the contractual terms of each client's assignment of his or her claims to the CSTF, any surplus amount that the CSTF may recover from respondent, beyond what it has already paid to the client and costs of collection, shall be paid over to the client. Thus it is proper and appropriate for this court to order Huber to make all restitution payments, both of principal to which he has not yet made restitution and interest upon all principal amounts up to the date of restitution (whether heretofore or hereafter made), to the CSTF, with the understanding that the CSTF shall forward to each client the portion of the interest attributable to that period of time that the client was deprived of his or her money (i.e., prior to the time that CSTF compensated the clients for the loss of his or her principal pursuant to Rule XII). Restitution to the CSTF must include interest for the period between the date the CSTF compensated each client and the date Huber

reimbursed the CSTF in full, because the CSTF was deprived of the use of its money for such period.

III.

The second question before us that Huber has identified is "[w]hether the Board erred in recommending that respondent should not receive credit for [the] time during which he was suspended by the Court, but did not obey the [suspension] order and that respondent's period of disbarment should run from the time he files a supplemental affidavit that complies with the requirements of Rule XI, § 14(g)."[3] Huber makes no legal argument on this point, but simply urges "that this Court use its discretion in making any disbarment nunc pro tunc to such date as the Court deems appropriate, all things considered."

Huber is in no position to raise at this point any objection to the requirement that he file a supplemental affidavit. He never in any form argued this point to the Board. Bar Counsel, in its response to Huber's Affidavit Declaring Consent, emphasized that Huber should be required to file a new § 14(g) affidavit

> in which he demonstrates with particularity and supporting proof that he has complied fully with the provisions of the Court's order of interim suspension and disbarment and with Rule XI, including notifying all clients, attorneys for adverse parties, and others listed in the rule with whom Respondent has dealt as a lawyer since his interim suspension.

Huber filed a reply to this pleading, but he addressed only question of interest; he never addressed the proposal that h

---

3 The suspension itself has been effective since our o March 8, 1995. The purpose of the § 14(g) affidavit is to s compliance with the suspension order to determine attorney may be eligible for reinstatement. *See In re Slo* A.2d 1329, 1331 (D.C. 1994) (explaining the prov designated as § 14(f)).

required to file a new affidavit until filing his brief in this appeal. He has therefore waived his right to raise the argument for the first time here. *See In re James*, 452 A.2d 163, 168-70 (D.C. 1982).

The only issue, then, is whether the disbarment should take effect from the date of the filing of the supplemental affidavit or from some earlier period, such as when respondent came fully into compliance with the terms of the suspension order and § 14. Under our rules, while an order of suspension or disbarment goes into effect at the time specified in the order, the time for purposes of reinstatement does not begin to run until the attorney files an affidavit under § 14(g) demonstrating full compliance with the order of suspension or disbarment. D.C. Bar R. XI, § 16(c). Compliance with the order and the terms of § 14 is not enough without the filing of the affidavit. *See In re Wiley*, 697 A.2d 406, 407 (D.C. 1997); *Slosberg*, *supra* note 3, 650 A.2d at 1331-33.[4] Under our rules, the filing of the affidavit is the requisite *final* step to be taken by the attorney in winding up his or her affairs after the effective date of the suspension or disbarment: the affidavit must, *inter alia*, "[d]emonstrat[e] with particularity, and with supporting proof, that the attorney *has fully complied* with the provisions of the order [of disbarment or suspension] and with this rule." D.C. Bar R. XI, § 14(g)(1) (emphasis added).

Here, Huber wilfully violated the terms of the order[5] and was convicted of criminal contempt for such actions.[6] By the

---

[4] In certain exceptional circumstances, we have accepted "full, though technically imperfect, compliance" with the affidavit requirement. *See Slosberg*, *supra* note 3, 650 A.2d at 1333 (distinguishing *In re Gardner*, 650 A.2d 693 (D.C. 1994)).

[5] Such a state of mind is a requisite for a criminal contempt conviction. *See In re Gorfkle*, 444 A.2d 934, 939-40 (D.C. 1982); *see also Zapata v. Zapata*, 499 A.2d 905, 908 (D.C. 1985).

[6] We do not deal here with a situation involving a lesser degree of awareness that a violation of the order or the rules has occurred, which might well present quite different considerations.

very structure of our rules, his affidavit of March 1995 was therefore rendered nugatory, and an obligation was placed upon him to again bring himself into compliance with the "provisions of the order and with this rule" and to demonstrate the same with a supplemental affidavit in order to start the period of disbarment running under § 16(c). Furthermore, Huber has been on notice at least since the response of Bar Counsel filed on March 17, 1997, and the issuance of the Board Report on April 23, 1997, that, in their view, such a renewed affidavit must be filed. Yet he took no such action until January 22, 1998, the day before oral argument on his exceptions to the Board Report.[7]

Under all these circumstances, we think the Board quite properly concluded that the disbarment imposed by consent should not begin to run for purposes of reinstatement under § 16(c) until an affidavit meeting all the requirements of § 14, including a demonstration of full compliance with the order and with the rules, is or has been filed.[8] Accordingly, it is

ORDERED that respondent Richard L. Huber is disbarred from the practice of law in the District of Columbia, effective upon such date as he shall have fully complied with the temporary order of suspension and with D.C. Bar Rule XI, § 14, including the filing of the requisite affidavit, and it is further

---

[7] In a motion for leave to file post-argument response, which we grant, Bar Counsel has challenged the accuracy and sufficiency of this affidavit and two subsequent "corrected" affidavits. We do not rule upon this factual dispute for purposes of this order. Likewise, we do not rule upon the factual questions of the amount of restitution that respondent has already made and the calculation of the interest in accordance with this order. Such matters should be first determined, if necessary, through the disciplinary fact-finding processes.

[8] The temporary order of suspension remains in full force and effect until the commencement date of the order of disbarment.

ORDERED that respondent shall complete restitution, including interest at the rate of six per cent per annum, in accordance with this opinion.

APPENDIX B

Brian B. Doyle, M.D., P.C.
1325 Eighteenth Street, N.W. Suite 209
Washington, D.C. 20036

Telephone (202) 296-5877

January 10, 1995

To: Mr. Stephen Polin, Esq.
4200 Cathedral Ave., NW #510
Washington, DC 20016

Affidavit of Brian B. Doyle, MD

I , Brian B. Doyle, MD, under oath do swear the following:
I have seen Mr. Richard Huber since October, 25, 1994 for the treatment of Dysthymic Disorder, which by history dates back to September of 1989. During periods of the intervening time, by history he warranted the additional diagnosis of Major Affective Disorder. He reports symptoms during that time of difficulty concentrating; problems functioning; feeling physically and mentally slowed down; feeling overwhelmed, despairing and meaningless. In approximately the last two years he has slowly improved, but he still does not feel his usual self. Currently the moderately sever diagnosis of Dysthymic Disorder best describes his condition. It was not until last fall, when others suggested he had a depression, that he saw a link between that disorder and his difficulties. He had long felt "not himself", and noted that others had remarked on his changed personality, but had not know why he was dysfunctional.

Mr. Huber sought treatment and has complied in it, meeting with me in weekly

individual psychotherapy and beginning antidepressant medication. To date the medication seems not to have helped significantly; it can be up to eight weeks before its benefit, if any is apparent. Mr. Huber feels that the psychotherapy has been useful to him, and I agree. He certainly is not a danger to himself or others because of his depression. Overall he has been making progress and, as I stated in my letter of November 28, 1994, his prognosis for eventual recovery from his depression is good.

Mr Huber has conveyed to me the nature of four specific allegations against him. According to him he made good his financial obligations to three clients and did not pay the fourth, to another lawyer, at the advice of prior counsel. I understand there is continuing disagreement about other moneys owed.

The pattern of professional disorganization and financial inattentiveness which he describes is familiar in the clinical picture of moderately to severely depressed people. As I understand it he has taken steps to reorganize and more tightly structure his professional practice.

I base my assessment of his clinical capacity to practice his profession on over 20 years of working with depressed and anxious people in the Washington area, many of them professional persons such as Mr. Huber. Clinically, being able to continue working helps many patients recover faster.

sig.

Brian B. Doyle, MD

District of Columbia
Subscribed and sworn to before me
this 10th day of January 1995
_____ sig. _____
Notary Public

My Commision Expires 2/15/99

APPENDIX C

BOARD OF PROFESSIONAL RESPONSIBILITY
District of Columbia Court of Appeals

IN RE RICHARD HUBER	)	Case no.
	)	44-2, et al.
Respondent	)	249-93,et al.

AFFIDAVIT OF STEVEN G. POLIN

I Steven G. Polin, do affirm that the following is true and correct to the best of my knowledge:

1. I was appointed substitute counsel in the matter on October, 19, 1994.

2. At this time, Mr. Huber advised me that he had been evaluated by the Lawyers Counselling Program. It was the opinion of Carolyn Jensen, that Mr. Huber had several indications that he was depressed. Referral were made for Mr. Huber to receive treatment from qualified medical doctors.

3. I advised Mr. Huber that based on this information that in his exceptions to the findings of Hearing Committees Four and Seven that it would be appropriate to raise mental disability as a mitigating factor in the imposition of discipline under the Kersey line of cases. I also advised Mr. Huber that I would seek a remand to have the mitigation issues heard.

4. On or about October 21, 1994, I had occasion to see Senior Assistant Bar Counsel Michael Frisch in the hallway of

4. On or about October 21, 1994, I had occasion to see Senior Assistant Bar Counsel Michael Frisch in the hallway of Superior Court. Mr. Frisch advised me that he was handling the Huber matter while Assistant Bar Counsel Julia Porter was on maternity leave. Mr. Frisch asked me if I was going to raise Kersey before the Board of Professional Responsibility. I advise Mr. Frisch that in all likelihood the issue would be raised. He advised me that if I raised Kersey, then Bar Counsel would seek the temporary suspension of Mr. Huber.

5. In each subsequent conversation I had with Mr. Frisch following the October 21, 1994, conversation, he reiterated that Bar Counsel would seek Mr. Huber's temporary suspension in the event that he raised Kersey.

I declare under the penalty and pains of perjury that the foregoing is true and correct to the best of my knowledge and belief.

_____
Steven G. Polin

District of Columbia, ss
Subscribed and sworn to before me
this 10th day of January 1995.

Janet King
Notary Seal

APPENDIX D

District of Columbia Court of Appeals

IN RE RICHARD HUBER	)	Appeal No. 95-BG-35
Respondent	)	Docket No. 44-92, et. al.

RESPONDENT'S AFFIDAVIT DECLARING CONSENT TO DISBARMENT

Richard Huber, duly deposed, declares the following to be true.

1. I am the subject of disciplinary proceedings. I have had hearings before two separate hearing committees, and an oral argument before the Board of Professional Responsibility (hereinafter "the Board"). The Board in February, 1995, issued its report and recommendation. The report recommended my disbarment upon a finding of acts of misappropriation of client money, acts of dishonesty, charging an excessive fee, failing to maintain proper records, and other ethical misconduct. The report further recommended that I make restitution to several clients.

2. On March 8, 1995, the District of Columbia Court of Appeals entered an order suspending me from the practice of law immediately. The order also directed that I place any fees tendered from any client in a trust fund.

3. In May, 1996, the Office of Bar Counsel filed a motion with the Court of Appeals requesting an order to show cause why I should not be found in contempt for

Appeals requesting an order to show cause why I should not be found in contempt for violating the suspension order of March 8, 1996. See attached copy of the Motion for an Order to Show Cause.

4. On February 21, 1997, pursuant to a plea agreement with Bar Counsel I entered a plea of guilty to one instance of unauthorized practice of law, and one instance of failing to place client fees in a trust account. I also agreed to make restitution to two individuals, not the subject of the Order to Show Cause, but for which I was retained to act as their attorney after the effective date of the suspension order.

5. I am making this petition for disbarment by consent freely and voluntarily. There have been no promises made to me, nor is this declaration the subject of coercion or duress. I am fully aware of the implication of consenting to disbarment. I have fully discussed with my attorney the report of the Board, the implication of my decision to seek disbarment by consent, and the effect it will have on my pending appeal of the Board's report.

6. I acknowledge that the material facts in the Board's report upon which the allegations of misconduct are predicated are true.

7. I am submitting this consent to disbarment because I am convinced that could not successfully defend the findings of the report of the Board in the District of Columbia Court of Appeals, where my case is currently pending. I have accepted the order of

the Board relating to restitution and I have begun making restitution to the D.C. Bar Client Security Fund in compliance with that recommendation. (See attached).

I hereby declare under penalty and pains of perjury that the foregoing is true to the best of my knowledge and belief.

3-3-97 sig.
Date Richard Huber

Affirmed before me this 3rd day of March, 1997.

Teresa C. Boyd 3-3-97
Notary Public
Notary Seal